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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 189

222 East Chestnut Street Corporation, a corporation of Delaware,
Petitioner,

vs.

LaSalle National Bank, a national banking association, not personally, but as Trustee under Trust Agreement dated December 28, 1954, and known as Trust No. 17365; Aaron B. Weiner, Mutual Properties Corporation, a corporation of Illinois; George L. Ramsey, individually and as Commissioner of Buildings of the City of Chicago; City of Chicago, a municipal corporation; Richard J. Daley, individually and as Mayor of the City of Chicago,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOSEPH F. ELWARD
111 W. Washington—Suite 1742
Chicago 2, Illinois
Attorney for 222 East Chestnut Street Corporation, Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

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To The Honorable, The Chief Justice, and The Associate Justices of The Supreme Court of the United States:

1. 222 East Chestnut Street Corporation, a corporation of Delaware, petitioner, prays for a rehearing of the order of this Court heretofore entered on October 13, 1958, denying petition for certiorari therefore filed by petitioner to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on March 6, 1958.

2. Petitioner avers that the ground for said rehearing is that in the said petition for certiorari, it was not sufficiently disclosed that there was a conflict between the decision of the Court of Appeals for the Seventh Circuit here, and the decisions of the Courts of Appeals of other Circuits, in that said Courts of Appeals for other Circuits had decided that a motion to dismiss complaint could not be treated as a motion for summary judgment, without express notice to plaintiff and without giving plaintiff an opportunity to file counter-affidavit. The petition for certiorari was filed herein on July 19, 1958; subsequently thereto in the advance sheets dated August 11, 1958, Vol. 256 F. 2d No. 4, p. 589, there appeared a report of the decision in *Herron* v. *Herron*, 5th Cir., in which that Court hold that it was reversible error for the district court to allow defendant to raise defense of statute of limitations on motion which court treated as motion to dismiss and not as motion for summary judgment, since (1) it had been necesary to go outside of pleadings to prove application of the statute, (2) object of motion had been to try the main issue in case and effect of dismissal had been a decision on merits, and (3) complainant had had no notice of hearing and no opportunity to meet the issues. Judgment for defendant was reversed and the cause remanded. The court said:

> (p. 593) "It is clear that Rule 8(c) requires affirmative defenses to be pleaded, in order to prevent surprise. There is general agreement also, under Rule 9(f), that even the defenses of limitations or laches may be asserted by motion to dismiss for failure to state a claim—provided that the complaint shows affirmatively that the claim is barred." (citing cases and texts).

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"The 1946 amendment to Rule 12(b) requires a motion to dismiss to be treated as a motion for summary judgment, if the movant goes outside the pleadings to prove his affirmative defense. 'In short, the motion to dismiss is thereby converted into a motion for summary judgment.'" (citing authorities)

The court concluded:

* * *

(p. 594) "The rules safeguard a complainant from surprise. Rule 56 requires that the motion for a summary judgment be served 'at least 10 days before the time fixed for the hearing'. Rule 6(d) requires five days. Under Rule 56 'the pleadings, depositions, and admissions on file, with the affidavits, if any, [must] show that there is no genuine issue as to any material fact'. The amendment to Rule 12(b) provides that if matters outside the pleadings are to be considered and the motion converted to one for summary judgment, 'all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56'"

"In going into the disputed facts and in dismissing the suit, the trial judge went beyond the scope of his authority as defined in Rules 12(b) and 56.

The solid justice embedded in these two rules is well illustrated in the instant case. There may or may not have been a trust. But the complainant was entitled to a fair shake at proving the existence of a trust. Instead, without notice, without an opportunity to produce witnesses or to examine books and records of obvious bearing on the issue, without realizing what was happening to him, it happened: the case was disposed of on the merits. Rules 12(b) and 56 are to prevent just such an oddity. Complainant never had his day in court."

The court's language is an apt description of the plight of petitioner here. In the instant case petitioner "never had his day in court."

3. Because this clear-cut conflict of decision did not appear on the petition for certiorari because the opinion had not then been reported, petitioner submits that the rehearing should be allowed and certiorari granted, *Sanitary Refrigerator Co.* v. *Winters* (1920) 280 U.S. 30, 34, footnote 1; *Schriber-Schroth Co.* v. *Cleveland Trust Co.* (1938) 305 U.S. 47, 51.

Respectfully submitted.

JOSEPH F. ELWARD,
Attorney for 222 East Chestnut Street Corporation, petitioner.

CERTIFICATE OF COUNSEL.

I, Joseph F. Elward, hereby certify that the aforesaid Petition for Rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds above specified, namely the conflict between the decision rendered in the instant case by the Seventh Circuit Court of Appeals allowing a motion to dismiss complaint to be treated as a motion for summary judgment without notice to plaintiff and without plaintiff having an opportunity to file counter-affidavit, and the decision rendered later by the Fifth Circuit Court of Appeals holding that such procedure constituted reversible error.

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JOSEPH F. ELWARD